Supreme Court, U.S.
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In the OFFICE OF THE CLERK

Supreme Court of the United States

Roy Den Hollander,

Petitioner on behalf of himself and all others similarly situated,

v.

Copacabana Nightclub, China Club, Lotus, Sol, A.E.R. Lounge, and Jane Doe Promoters,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Roy Den Hollander
Counsel of Record
545 East 14 St., 10D
New York, N.Y. 10009
(917) 687-0652

Counsel for Petitioner

QUESTIONS PRESENTED

There are two types of "Ladies' Nights" operated by nightclubs opened to the public that serve alcohol for consumption on their premises: (1) those that charge males more for entering a nightclub than females, for example, males pay $20 to walk through the door, ladies $0; and (2) those that charge males more for drinks than females, for example, a male will pay $12 for a vodka gimlet and a lady $8.

1. Is there a conflict between the Eighth Circuit Court of Appeals decision, *Comiskey v. JFTI Corp.*, 989 F.2d 1007 (8th Cir. 1993), which holds there is no state action when a public accommodation nightclub hands over an alcoholic drink to a customer, and the Second Circuit Court of Appeals decision, the subject of this petition, which supports the proposition that state action does exist when alcoholic drinks are served customers by a nightclub opened to the public?

2. Did the Second Circuit improperly extend the reach of the state action analysis in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), to all public accommodations serving alcohol even though *Moose Lodge* only concerned a private membership organization?

3. Is the production, distribution, and sale of alcohol an exclusively traditional state function; that is, a public function?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a) can be found at 2010 U.S. App. LEXIS 18229 and 2010 WL 3419954. The opinion of the United States District Court for the Southern District of New York (App. 8a) is reported at 580 F. Supp. 2d 335 (S.D.N.Y. 2008).

The Southern District Court of New York ("S.D.N.Y.") dismissed under Fed. R. Civ. P. 12(b)(6) plaintiff Den Hollander's 42 U.S.C. § 1983 action. The Second Circuit affirmed the dismissal.

JURISDICTION

The Court of Appeals judgment was entered on September 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 because the action arose under

the Fourteenth Amendment to the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection clause of the Fourteenth Amendment (App. 25a) requires "state action," *United States v. Harris*, 106 U.S. 629, 638-39 (1883)(lynching of black man by private white citizens constitutional because no state action), and is enforced by 42 U.S.C. § 1983 (App. 26a), which requires that the discriminatory conduct occur "under color of state law." "If a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n. 2 (2001)(citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982)).

The Twenty-first Amendment (App. 25a) "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure [their] liquor distribution system," which includes the retail sale of alcohol in nightclubs, bar, and stores. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980).

STATEMENT OF THE CASE

During "Ladies' Nights," a number of New York City nightclubs ("Nightclubs") charge males

more for admission than females.

The Nightclubs are public accommodations and not private membership clubs, ABC Law § 3 (9), as was the club in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)(no state action by private membership club discriminating against African-Americans).

The New York State Liquor Authority ("SLA"), pursuant to the Twenty-first Amendment and New York's Alcoholic Beverage Control ("ABC") Law enacted under the State's police power, delegates to the Nightclubs the State's power to serve alcohol for on premise consumption to the public.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's opinion conflicts with the Eighth Circuit's ruling in *Comiskey v. JFTI Corp.*, 989 F.2d 1007 (8th Cir. 1993), where the Eighth Circuit held that state action does not exist when public accommodation nightclubs charge males more for drinks than females.

The Eighth Circuit in *Comiskey v. JFTI Corp.*, 989 F.2d 1007, 1008-09, 1011 (8th Cir. 1993), holds there is no state action in charging males higher prices for alcohol in nightclubs opened to the public. The Second Circuit and S.D.N.Y.'s decisions, however, support the proposition that state action is involved when public accommodation nightclubs charge males more for drinks.

The Second Circuit and S.D.N.Y. courts held that when nightclubs charge males more for admission, but not drinks, there is no state action because nightclubs are only licensed to sell alcohol and no alcohol is sold in charging males to enter a nightclub. *Second Circuit Opinion*, p.5, App. 7a; *S.D.N.Y. Opinion*, pp. 7, 8, 11, App. 16a, 17a, 22a. So while state action does not exist when entering a nightclub, it does, under the Second Circuit and S.D.N.Y.'s opinions, exist at the bar when a nightclub serves an alcoholic drink because that is the very activity New York State delegates nightclubs the power to carry out.

The Second Circuit and S.D.N.Y.'s legal analyzes finding no state action at the entrance to a nightclub rely on the reasoning that state action exists when alcoholic drinks are sold. Both courts distinguished between charging different admission prices and different prices for drinks in determining whether state action existed.

The Second Circuit reasoned, "The alleged deprivation here is discriminatory admission prices ...and the alleged grant by the state is the privilege to sell alcohol." (*Second Circuit Opinion*, p. 5, App. 7a).

The S.D.N.Y.'s reasoning, which the Second Circuit followed, stated:

> When defendants sell alcohol, they are exercising a privilege created by the State. But when they reduce the cover charge to women on certain nights,

> they are not acting under any right or privilege created by the State because neither the ABC Law nor the SLA regulates the admission prices set by the defendants. In other words, [plaintiff] Den Hollander's alleged deprivation was not caused by defendants' sale of alcohol but by their pricing of admission to the entertainment provided by their nightclubs.

(*S.D.N.Y. Opinion*, p. 7, App. 16a);

> Ladies' Night promotions[ ] and defendants do not discriminate against men in their right to purchase and be served liquor.

(*S.D.N.Y. Opinion*, p. 8, App. 17a (citing *see Moose Lodge*, 407 U.S. at 175-76)).

> The state actor analysis in [*Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253, 1259 (S.D.N.Y. 1969)(state action found)] was undertaken in light of the fact that the discrimination alleged, refusal to serve alcohol, resulted from McSorleys' possession of a license to sell alcohol.

(*S.D.N.Y. Opinion*, p. 11, App. 22a).

While both the Second Circuit and S.D.N.Y.'s rulings do not directly state the proposition that state action exists in the selling of alcoholic drinks, they clearly support it. There is an inferential step between the opinions' analyzes and the proposition

which allow for a "*see*" signal when citing the two rulings. *The Bluebook*, pp. 22-23, 17th ed. (2000). It is this proposition that conflicts with the Eighth Circuit decision in *Comiskey* that found no state action when a public accommodation nightclub held Ladies' Nights "during which time all of the female patrons receive free drinks while males pay full price." *Comiskey* at 1008-09, 1011.

II. The Second Circuit improperly extended the reach of the state action analysis in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), to all public accommodations serving alcohol even though *Moose Lodge* only concerned a private membership organization.

The Second Circuit relied solely on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972), to find that a state regime controlling alcohol does not "form a basis for state action" by nominally private entities. *Second Circuit Opinion*, pp. 5-6, App. 7a, 8a ("The Supreme Court specifically held that a liquor license is insufficient to establish state action."). The problem with relying on *Moose Lodge* is that in doing so the Second Circuit expanded *Moose Lodge's* state action analysis to include entities that are open to the public.

Moose Lodge was not about a public accommodation, which the Nightclubs are in this case. *Moose Lodge* concerned only a private membership club that was closed to the general public. "Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostenta-

tiously proclaims the fact that it is not open to the public at large." *Moose Lodge*, 407 U.S. at 175.

Such private membership organizations only admit their members and guests. So it is no surprise that *Moose Lodge* did not find state action because the very purpose of such clubs is to allow individuals to associate with whom they wish as though they were in their own home. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Marsh v. Alabama*, 326 U.S. 501, 505-06 (1946).

The *Moose Lodge* decision of no state action was necessary to preserve "an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Otherwise, the proverbial right of a homeowner to decide in choosing whom he shall invite to dinner would be threatened. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 604 (S.D.N.Y. 1970); *see Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)("One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.").

The Second Circuit's use of *Moose Lodge*, however, found that public accommodation nightclubs have a right coextensive with a private membership club and by implication with a homeowner to decide who frequents their establishments. This conflicts with *Edmonson*, *Lugar*, *Marsh*, and *Shelley* cited above.

The Second Circuit stated that it relied on *Moose Lodge* "with great reluctance ... but until the Supreme Court revisits [it], we are required to follow its holding." *Second Circuit Opinion*, p. 6, App. 8a. Apparently, the Second Circuit is requesting this Court to specifically limit the holding of *Moose Lodge* to only private membership organizations and homeowners.

III. The production, distribution, and sale of alcohol is a power exclusively and traditionally reserved to the states, which makes it a public function.

The Second Circuit's state action analysis failed to first determine whether the Nightclubs exercised an exclusively traditional state function, or public function, in providing alcohol for on premise consumption.

Prior to the 1980s, the Supreme Court did not use the two-prong analysis of *Lugar* for determining whether a nominally private party was acting with state action. "Rather the [Supreme] Court merely determined whether: (1) the private actor who caused the harm to another individual was performing a traditional government function (so that the private actor would automatically be acting with state action) or (2) the totality of facts and circumstances ... made it fair to say that the private actor had acted with state action." Rotunda, Nowak, *Treatise on Constitutional Law*, § 16.1, p. 1002, 4th ed. (2007).

The Supreme Court's subsequent decisions that did use the two-prong approach "did not change any of the Court's earlier state action rulings," so it is important to understand the two-prong inquiry "in terms of all of the Court's state action decisions." *Id.* For this reason, the public function cases need to be separated from all other types. *Id.* In making a state action decision, a court should "first decide whether the private actor was engaging in a[n] [exclusively] traditional public function." *Id.* at pp. 1002-03. The Second Circuit did not make such a finding, or even consider whether providing alcohol is a public function.

When a public function is involved, both prongs of the *Lugar* test are also satisfied, Rotunda & Nowak, *Treatise on Constitutional Law*, § 16.1, p. 1003, since the two prongs, which are related, "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to [its] decisions." *Lugar*, 457 U.S. at 937; *Second Circuit Opinion*, p. 4, App. 6a. In other words, the deprivation was caused by a party acting with the "apparent authority" of the State. *See Lugar*, 457 U.S. at 937.

The Second Circuit wrongly held that the two prongs did not collapse by ruling the Nightclubs' operations lacked the "apparent authority" of the State. *Second Circuit Opinion*, p. 4, App. 6a. In reaching that holding, the Second Circuit ignored the historical fact that the trafficking in alcohol is and has been since Colonial times the exclusive prerogative of the states, providing the states do

not violate the U.S. Constitution, *Granholm v. Heald*, 544 U.S. 460, 486-87 (2005). "[T]he regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers." *Goesart v. Cleary*, 335 U.S. 464, 465 (1948)(Frankfurter, J.), *overruled on different grounds*, *Craig v. Boren*, 429 U.S. 190, 210 n. 23 (1976).

"The Twenty-first Amendment grant[ed] the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980). "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation .... States may also assume direct control of liquor distribution through state-run outlets or funnel sales through" manufacturers, wholesalers, and retailers. *Granholm*, 544 U.S. at 488-89.

Prior to the Twenty-first Amendment, "[t]he police power of the States over intoxicating liquors was extremely broad ....." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)(citing *Crane v. Campbell*, 245 U.S. 304, 307 (1917)). The Supreme Court in *Crane* in 1917 held that "it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." *Crane*, 245 U.S. at 308. States had the power to ban alcohol completely and did so.

New York State banned alcohol completely with the passage of the Mullen-Gage Law when it accepted Prohibition. *Report of the N.Y. State Liquor Authority: The Modern Liquor Control System of New York State*, p. 5, April 12, 1933 to December 31, 1934, App. 28a. Then in ratifying the Twenty-first Amendment, New York rejected Prohibition, and in doing so it confirmed that the retail sale of alcohol was not a private activity, but one reserved to the State. *See Calvary Presbyterian Church v. SLA*, 245 A.D. 176, 178, 281 N.Y.S. 81, 85 (4th Dep't 1935), *aff'd*, 270 N.Y. 497, 200 N.E. 288 (1936)(the alcohol industry in New York is a creature of state sovereign police power).

Following Prohibition, New York State could have decided to set up and operate on-premise retailers itself in which any discrimination in admission policies or in employee hiring or in supplier contracting or any other activity would constitute state action. New York, however, chose a mechanism to control alcohol consumption by establishing through the ABC Law and the SLA a system of agents strictly overseen and limited by the State. ABC Law § 2; *N.Y. State Moreland Commission on the Alcoholic Beverage Control Law ("Moreland Commission")*, Study Paper No. 5, Preface, October 28, 1963, App. 30a.

Under this system, New York delegated part of its traditionally exclusive power over alcohol to nominally private parties, but retained the power "to alter: (a) the industry's structure ...; (b) the industry's behavior, by prescribing and proscribing specific dimensions of business conduct." *Moreland*

Commission, Study Paper No. 4, p. 6, October 27, 1963, App. 29a. The State can at any time change the arrangement and take unto itself the functions of all its surrogates. *McSorleys*, 317 F. Supp. at 599 -600; *Moreland Commission*, Study Paper No. 4, pp. 39, App. 29a ("Should all options consistent with a private system [of alcohol vendors] be rejected, a full-fledged state monopoly would remain as a final solution.").

The State's delegating of its exclusive power over alcohol "to a private party ... make[s] that party a state actor," *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 195 (1988), who is carrying on a public function; therefore, the private party is subject to the Constitution, *see Jackson v. Metro. Ed. Co.*, 419 U.S. 345, 352-53 (1974). "When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299, 301 (1960)(private operators of park were city agents, and just as the city could not discriminate in admission or in sweeping, manicuring, watering, patrolling, and maintaining the park, neither could the city's agents); *Marsh,* 326 U.S. at 509 ("Had the title to [the company town] belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear" that the Constitution was violated.).

Since New York State uses the Nightclubs, and other such establishments, to serve alcohol for on premise consumption rather than carrying out that function itself, or banning it, the Nightclubs are standing in the shoes of the State. "It is the [Nightclubs'] function within the state system ... that determines whether [their] actions can fairly be attributed to the State, *West v. Atkins*, 487 U.S. 42, 55-56 (1988)(citation omitted); *see Evans*, 382 U.S. at 302, and "[i]t is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State," *West*, 487 U.S. at 49-50.

New York State chose to bear the affirmative obligation of providing alcohol to its citizens, it delegated part of that function to the Nightclubs, and the Nightclubs voluntarily assumed that obligation. The State's delegation did not relieve it of its duty under the Twenty-first Amendment and the ABC Law, nor did it deprive the Nightclubs' male customers of the means to vindicate their Equal Protection rights. *Cf. West*, 487 U.S. at 56.

> The state cannot free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to otherwise private individuals. If private actors assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as

> would be imposed upon the state itself.

Rotunda, Nowak, *Treatise on Constitutional Law*, § 16.2, p. 1010.

In doing the State's work in an area of an exclusively traditional state function, the Nightclubs discriminatory admission policies involve state action under the public function test.

CONCLUSION

The impact of the Second Circuit and S.D.N.Y.'s decisions is that under the Equal Protection Clause of the Fourteenth Amendment, any establishment opened to the public that serves alcohol can effectively ban members of the male sex by simply charging them so much that none other than Wall Street Moguls could afford the admission price. Group identification based on sex is now germane to exercising the fundamental right of association in places of public accommodation that serve alcohol.

The Second Circuit and S.D.N.Y. courts have resurrected the political versus social rights theory of the 18th century. In the *Civil Rights Cases*, 109 U.S. 3 (1883)(Harlan, J., dissenting), and *Plessy v. Ferguson*, 163 U.S. 537 (1896)(Harlan, J., dissenting), the U.S. Supreme Court justified discrimination against people of a darker skin complexion on the theory that the Constitution only guarantees political or civic equality, which is the purview of government, but not equality in social rights, the area of action and choices by public premises. The

two lower courts' opinions parallel this bankrupt theory in the realm of sexual distinctions rather than color.

Today, males can be effectively barred from the social mingling in a public accommodation serving alcohol while females walk in for free because such establishments can constitutionally choose to charge males more than females. These establishments would not dare charge females more because of the social climate in America today.

The *Civil Rights* and *Plessy* decisions provided the legal basis for 70 years of ignorance and prejudice that institutionalized itself in every area of society where people interacted with each other. The Second Circuit and S.D.N.Y. courts have laid the same foundation for discriminating against males in every area of society that is not directly under the control of government, or in which state laws do not explicitly prohibit discrimination, or where the states refuse to enforce their laws against sex discrimination.

Ironically, it was the failure of state laws and state enforcement to provide equal protection for their residents following the Civil War that resulted in the passage of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983. The Second Circuit and S.D.N.Y. courts' narrow reading of the 1871 Act once again effectively leaves to the states the responsibility of protecting their citizens from discrimination. The two courts have opened the door for states, if they so choose, as does New York, to

stand idly by while nominally private persons involved in the liquor industry deprive the rights and privileges of others—this time men.

Plaintiff Den Hollander requests this Court grant certiorari.

Dated: October 14, 2010

Roy Den Hollander, Esq.,
Counsel of Record
545 East 14 Street, 10D
New York, N.Y. 10009
(917) 687-0652